Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local	)	
Exchange Carriers	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications	)	
Act of 1996	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability	)	

REPLY COMMENTS OF NEWSOUTH COMMUNICATIONS

Michael H. Pryor
Christopher R. Bjornson
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Counsel to NewSouth Communications

Jake E. Jennings
Vice President – Regulatory Affairs
NewSouth Communications
NewSouth Center
Two N. Main Center
Greenville, SC 29601
864/672-5877

July 17, 2002

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF NEWSOUTH COMMUNICATIONS

NewSouth Communications Corporation ("NewSouth"), submits these reply comments in response to the *Notice of Proposed Rulemaking* ("*Notice*")[1/] in the above captioned proceeding. The *Notice* initiates the Federal Communications Commission's ("Commission's" or "FCC's") first triennial review of its rules implementing the unbundling obligations set forth in sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 ("Act" or "1996 Act").[2/] The Commission's rules were initially adopted in the *Local Competition Order*.[3/] Following the Supreme Court's

---

1/ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, 98-147, *Notice of Proposed Rulemaking*, FCC 01-361 (rel. Dec. 20, 2001) ("*Notice*").

2/ Pub. L. No. 104-104, 110 Stat. 56, 62-63 (codified at 47 U.S.C. § 251) (1996).

3/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, 11 FCC Rcd 15499 (rel. Aug. 8, 1996) ("*Local Competition Order*"), *subsequent history omitted*.

remanding of those unbundling rules back to the Commission in 1999,[4/] the Commission adopted its current unbundling rules in the *UNE Remand Order*.[5/]

On May 30, 2002, the Commission extended the reply deadlines in this proceeding to give parties an opportunity to address the release of the decision of the Supreme Court in *Verizon v. FCC*, 122 S.Ct. 1646 (2002) ("*Verizon*") and the decision of the D.C. Circuit in *United States Telecom Association v. FCC*, 290 F.3d 415 (2002) ("*USTA*"), affecting the matters under consideration in this proceeding.[6/]

I. INTRODUCTION AND SUMMARY

In its initial comments, NewSouth demonstrated that it was impaired without access to unbundled local loops, including DS1 level loops, and that it was impaired without access to unbundled switching and UNEP for lower volume customers. NewSouth also identified a number of steps that the Commission could take to ensure that local loops (including EELs) could be accessed more efficiently. The record

---

4/ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999) ("*Iowa Utilities*").

5/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*"), *subsequent history omitted*.

6/ Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings, CC Docket No. 01-338, *Public Notice*, DA 02-1291 (rel. May 30, 2002). On May 13, 2002, the U.S. Supreme Court upheld the FCC's TELRIC pricing rules for UNEs and the Commission's rules for combining unbundled network elements. *Verizon Communications v. FCC*, 122 S.Ct. 1646 (2002) ("*Verizon*"). Less than two weeks later, the D.C. Circuit remanded the *UNE Remand Order* and the *Line Sharing Order*. *See United States Telecom Association v. FCC*, 290 F.3d 415, 422-28 (D.C. Cir. 2002) ("*USTA*"). On July 8, 2002, the Commission filed a Petition for Rehearing or Rehearing *En Banc* asking the D.C. Circuit to grant a rehearing in *USTA v. FCC*. *See* Petition for Rehearing or Rehearing *En Banc* of the Federal Communications Commission, *USTA v. FCC* (D.C. Cir. filed July 8, 2002) (Nos. 00-1012, *et al.*, and 00-1015, *et al.*) ("*Rehearing Petition*").

developed in this proceeding provides ample evidentiary support for NewSouth's conclusions.

Neither *Verizon* nor *USTA* warrants reaching a different conclusion. The Supreme Court's decision in *Verizon* in fact buttresses NewSouth's contentions for it affirmed that the overriding goal of the 1996 Act's local competition provisions is the elimination of the ILECs' monopoly by ensuring that new entrants have cost-based access to network elements that are "very expensive" to duplicate. *USTA*, when read in light of *Verizon*, as it must be, does not undermine NewSouth's impairment showing. Indeed, *Verizon* and *USTA* lend significant support for NewSouth's request to revamp or clarify policies that will ensure more efficient loop access because those policies reduce the entry barriers of switch deployment – entry barriers that, properly understood, are linked to natural monopoly. The elimination of these barriers will enhance the ability of carriers to provide facilities-based competition with respect to those elements, like switching, that are more sensible to duplicate in certain circumstances.

The record amply supports the conclusion that local loops (and EELs) of all capacities are unnecessarily expensive to duplicate and, in fact, exhibit characteristics of natural monopoly, including sunk costs, economies of scale and scope, and additional entry barriers such as the need to obtain rights-of-way. Although switches are, in certain circumstances, more sensible to duplicate, there are barriers to the ability of CLECs to provide services via self-provisioned switches. These entry barriers exist because the CLECs cannot provide service with their own switches unless those switches are combined with the ILEC's local network. These barriers often preclude CLECs from providing switch-based services to customers below the DS1 level. They include:

- the cost of having to collocate equipment in ILEC central offices in order to access the loop;
- the costs and delays in having to manually cutover the loop from the ILEC to the CLEC; and
- the costs of having to backhaul traffic from collocation arrangements to the CLEC switch.

These costs are, in the words of *USTA*, "linked, in some degree, to natural monopoly" because they involve the unavoidable need to combine CLEC switches with ILEC loops and transport.

As these costs and barriers are reduced, CLECs will be able to make more efficient use of existing switches, deploy additional switching equipment and, as a result, reduce reliance on ILEC switching and UNEP for an ever increasing number of customers. NewSouth and other carriers have identified a number of steps (in many cases, simply policy clarifications) that reduce these costs, such as eliminating the requirement that CLECs build costly collocation facilities in order to access local loops; clarifying that ILECs must attach electronics to derive DS1 loops; clarifying when facilities should be deemed available for unbundling purposes in order to reduce ILEC gameplaying; eliminating use and co-mingling restrictions; and adopting electronic loop provisioning.

Effectively, these steps constitute an exit mechanism by which ILECs can reduce or eliminate their unbundled switching obligations. To the extent that ILECs can demonstrate that they have eliminated the barriers to entry for switch-based competition, ILECs can then reduce or avoid altogether their unbundled switching obligations. NewSouth believes that this demonstration can best be undertaken by State Commissions based on guidelines and policies adopted by the Commission in this proceeding.

In Section II, NewSouth discusses the impairment standard in light of *Verizon* and *USTA* and explains that, under those decisions, the existence of one or even a few carriers that have self-deployed a network element in discrete circumstances cannot be the basis for removing the obligation to provide that element on an unbundled basis for other carriers. In Section III, NewSouth demonstrates that the evidence developed in this proceeding amply supports the conclusion that carriers are impaired without access to local loops and EELs, including DS1 level loops. Section III also explains that carriers are impaired in their ability to provide services at less than the DS1 level without access to unbundled switching and UNEP. Impairment here is demonstrated, *inter alia*, by the costs and barriers necessarily incurred when new entrants must integrate their switch with ILEC loops and transport.

Section IV identifies policies that will promote further switch-based competitive service by reducing these costs of and barriers to integrating the switch into the ILECs' network. It explains that adoption and implementation of these policies by the ILECs can form the basis for reduction or elimination of the unbundled switching obligation. It also describes how State Commissions would be in the best position to assess whether ILECs have adopted these policies in such a way as to justify removing unbundling obligations with respect to particular areas or capacity levels.

Section V calls into question the veracity of the ILECs' so-called Fact Report in light of the blatantly erroneous information included in that report with respect to NewSouth. As support for its contention that unbundling of loops and transport is no longer necessary in light of the purported degree of CLEC deployment, the "Fact Report" erroneously claims that NewSouth has deployed fiber in a number of MSAs. In fact,

NewSouth has not deployed any of its own fiber in any location. Finally, Section VI proposes the adoption of a grandfathering provision to ensure that customer relationships are not disrupted if the Commission finds it appropriate to "de-list" any UNEs either now or in the future.

II. IMPAIRMENT ANALYSIS IN LIGHT OF *VERIZON* AND *USTA*

Overview. A number of important points emanate from *Verizon* that help inform this Commission's review of the scope of the ILECs' unbundling obligations consistent with the 1996 Act. First, the overriding goal of the local competition provisions of the 1996 Act is to aid competitors in destroying the incumbent's monopoly. The Supreme Court's opinion nowhere suggests that this preeminent goal can take a back seat to efforts to deregulate ILECs, to provide greater incentives for ILECs to invest in broadband, or to promote facilities-based competition at the expense of competitive entry through the use of UNEs. Second, the ability of one or more carriers with the resources to self-provision an expensive element cannot preclude other carriers without similar resources from obtaining access to that same element on an unbundled basis. Thus, evidence of self-provisioning by one or a handful of carriers cannot be the sole basis for eliminating UNE access. Third, the cost of duplicating an element is a critical component of the impairment analysis. The cost, however, need not rise to the level of economic waste in order to demonstrate impairment. It is sufficient, under *Verizon,* if the element is too expensive to duplicate given the resources of the "hundreds of smaller entrants" seeking to enter the market. Thus, evidence that a substantial number of carriers have not self-deployed a particular element, and instead must rely on unbundled access in order to compete with the incumbent, is a powerful, if not determinative, indicator of impairment.

Although not compelled by *Verizon*, it is appropriate to make this latter determination on a more granular basis as long as relevant market parameters are utilized. NewSouth believes that transmission capacity may be a relevant market parameter in narrowly defined geographic markets. Having said that, the record in this proceeding demonstrates that there is no relevant difference in impairment without access to local loops in any conceivably defined relevant market, indicating that loops should continue to be made available in all areas at all capacity levels.

Argument. In *Verizon*, the Supreme Court made it perfectly clear that the local competition provisions of the 1996 Act have but one overriding purpose – to end the monopoly enjoyed by the Bell Operating Companies and other entrenched incumbents by rendering them "vulnerable to interlopers."[7/] The Court went so far as to quote a "leading backer" of the 1996 Act who explained that the Act's goal of "uprooting the monopolies" will be accomplished by requiring the monopolist to "do everything I have to [sic] let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything … Now this legislation says you will not control much of anything."[8/] According to *Verizon*, the Act's unbundling rules are "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short

---

7/ *Verizon*, 122 S.Ct. at 1654, 1661 (The local competition provisions of the Act were "intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises"); *id.* at 1660 ("Under the local competition provisions of the Act, Congress called for ratemaking different from any historical practice, to achieve the entirely new objective of uprooting the monopolies that traditional rate-based methods had perpetuated."); *id* at 1661 (Congress sought to "reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers").

8/ *Id.* at 1661 (quoting 141 CONG. REC. 15,572 (1995) (Remarks of Sen. Breaux on Pub. L. 104-104)).

of confiscating the incumbents' property."[9/] And not just one or two competitors, but "the hundreds of smaller entrants … seeking to gain toeholds in local-exchange markets."[10/] *Verizon's* definitive interpretation of the 1996 Act as being primarily designed to aid competitors in destroying the incumbent's entrenched monopoly should inform the scope of Section 251(c)(3)'s unbundling obligations.

In charring juxtaposition to the Supreme Court's definitive and binding interpretation of the statute's local competition provisions as ones designed preeminently to destroy the local monopoly by aiding in every way possible "short of confiscation" the ability of smaller carriers to gain a toehold in the local market, the ILECs and their allies contend that those provisions must instead be implemented in a way that maximizes the monopolist's incentives to provide broadband services[11/] and, as a by-product, bails out the telecommunications equipment manufacturers. Even if one were to believe the ILECs' contentions that the current unbundling rules act as a disincentive to investment – an argument explicitly rejected by the Supreme Court as contrary to fact and "commonsense"[12/] – concerns over ILEC incentives cannot trump the Act's basic purpose of aiding competitors in prying open the local market.

Moreover, the Act does not proceed on the basis that the benefits of unbundling to new entrants must be carefully weighed against the costs of unbundling to ILECs. Rather, the Act is deliberately one-sided. As noted by the Supreme Court, the

---

9/ *Verizon*, 122 S.Ct. at 1661.

10/ *Id.* at 1672 n.27.

11/ *See, e.g.*, BellSouth Comments at 12 & n.33; SBC Comments at 61-65; Verizon Comments at 35-36 & n.135.

12/ *See Verizon* at 1675-76 & n.33.

unbundling provisions in the Act, at least with respect to UNE rates, are aimed "not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers."[13/] The Supreme Court further finds that the Act "proceeds on the understanding that incumbent monopolists and contending competitors are unequal."[14/] Rules designed to restrict access to ILEC network elements in the hope that ILECs would therefore be encouraged to deploy more broadband facilities, would be wholly inconsistent with the Supreme Court's opinion in *Verizon.*

The ink had barely dried on the Supreme Court's opinion when the D.C. Circuit issued its decision in *USTA.* As the Commission correctly argues in its recently filed *Rehearing Petition*, *USTA* is, "at a minimum, fundamentally in tension" with *Verizon,* and, it is fundamentally at odds with the statute.[15/] At the most basic level, *USTA* rests on the premise specifically rejected by the Supreme Court – that unbundling obligations must be circumscribed through a careful weighing of their effects on ILECs.

Moreover, to the extent *USTA* suggests that a network element need only be unbundled if it meets the antitrust standard of an essential facility,[16/] *USTA* is in tension with *Verizon* and the statute. As the Commission points out in its *Rehearing Petition*, reading impairment to turn on natural monopoly-related cost disparities is inconsistent

---

13/ *Id.* at 1661.

14/ *Id.* at 1684. The Supreme Court found Congressional intent to be fairly clear, noting that "[i]f Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined." *Id.*

15/ *Rehearing Petition* at 1.

16/ *USTA*, 290 F.3d at 427 (apparently rejecting impairment based on cost disparities not "linked (in some degree) to natural monopoly").

with the 1996 Act because it fails to distinguish between the statutory standards of "necessary" and "impair," and it fails to take into account Section 271 requirements.[17/]

Indeed, the statute would appear to be superfluous if it imposed a duty on ILECs to share their facilities only to the extent that the legal elements of the essential facility doctrine are met. The purpose of the essential facility doctrine is to determine when a monopolist should be required to share facilities – but Congress has already made the determination that ILECs must share their network elements in section 251(c)(3). Moreover, as the Commission has argued to the courts, the 1996 Act imposes duties on ILECs to assist their competitors that "go well beyond what the antitrust laws would require."[18/] NewSouth concurs with the Commission that CLECs need not make an essential facilities showing in order to demonstrate impairment without access to a particular network element.[19/]

If an essential facilities test is not required to demonstrate impairment, what is the appropriate test? The Supreme Court's opinion in *Verizon* provides substantial guidance on what constitutes impairment. It suggests that an element must be unbundled, or in its words "shared," if it is "very expensive" or "unnecessarily expensive" to duplicate.[20/]

17/ *Rehearing Petition* at 11-13.

18/ *See* Brief for the United States and the Federal Communications Commission as Amici Curiae at 21, *Covad Communications Co. v. BellSouth Corp.* (11th Cir. filed Dec. 17, 2001) (No. 01-16064-C).

19/ Even if impairment were found to require a demonstration of costs linked in some degree to natural monopoly, the record in this proceeding readily demonstrates impairment under such a standard for local loops. Moreover, properly understood, the costs of self-provisioning local switching include costs linked to natural monopoly because many of those costs involve having to combine the switch with the ILECs' network, as explained herein.

20/ *Verizon*, 122 S.Ct. at 1668 n.20, 1672 n.27.

Verizon thus appropriately focuses on the cost of providing the element in the absence of unbundling.[21/] *Verizon* does not contemplate that the cost of duplicating an element must rise to the level of economic waste before impairment can be demonstrated. Instead, the ability of a carrier economically to duplicate an element in light of its cost is measured with respect to the resources available to the specific company. The Supreme Court made clear that carriers with fewer resources are impaired without access to an element if it is prohibitively expensive for those smaller carriers "sensibly" to duplicate that element, even if larger carriers with more resources can duplicate the element.[22/]

Verizon's acknowledgement that smaller carriers may be impaired without access to network elements even where carriers with greater resources are able to self-provision those same elements completely eviscerates ILEC arguments that the presence of one or more large competitors with the financial wherewithal to duplicate elements negates the duty to provide those same network elements to any other requesting carrier. In a similar vein, the Supreme Court's analysis suggests that the presence of intermodal competition is largely, if not wholly, irrelevant to the impairment analysis. The ability of a cable provider, for example, to provide some alternative broadband or competitive service over its cable plant says nothing about the "reality faced by hundreds of smaller entrants"

21/ *Verizon* and *USTA* agree that the cost of duplicating a network element is the most critical impairment factor. *USTA*, 290 F.3d at 426 ("Of course any cognizable competitive 'impairment' would necessarily be traceable to some kind of disparity in cost"). The emphasis of *Verizon* and *USTA* on cost is a complete answer to the Commission's question of whether cost should be given less weight than other impairment factors. That answer, of course, is a resounding no.

22/ *See Verizon* 122 S.Ct. at 1672 n.27 (noting that "the reality faced by the hundreds of smaller entrants" is that they will need access to unbundled network elements in instances when larger competitors may not).

without similar resources but who nonetheless seek to gain a toehold in the local market and require access to expensive-to-duplicate elements in order to do so.

This is not to say that the duty to unbundle any particular network elements must continue as long as even the most inefficient carrier can still demonstrate impairment. The Commission has never applied such a test and should not do so now.[23/] The Supreme Court's analysis does, however, render untenable the ILECs' contention that if even one competitor, or even a handful of competitors, has found it economical to self-deploy an element, no other carrier can demonstrate impairment with respect to that same element in the same market.

Instead, the Supreme Court's analysis suggests that if a substantial number of carriers are not able to duplicate a network element (or economically obtain the element from a third party) without incurring undue expense, that element should continue to be unbundled. NewSouth, for example, has focused its comments in this proceeding on impairment without access to DS1 level local loops (including EELs),[24/] and impairment without access to UNEP for customers requiring only a relatively small number of lines, for example less than twelve voice lines. Every carrier in this proceeding that provides service to customers via DS1 unbundled loops has provided evidence that they cannot

---

23/ *See UNE Remand Order* ¶ 53 (unbundling obligations do not rely on the efficiency or inefficiency of any particular carrier).

24/ This is not to suggest that NewSouth and other carriers are not impaired without access to higher capacity loops. As a matter of an evidentiary showing with respect to loop impairment, NewSouth has focused its comments to DS1 loops. Other carriers have demonstrated impairment without access to higher capacity loops, and this showing is equally applicable to NewSouth. *See, e.g.*, AT&T Comments at 134 (the "smallest fiber-loop facility that can be installed is an OC-3 loop").

duplicate that element economically.[25/] The record developed to date thus provides formidable evidence of impairment without access to these network elements, and such a finding clearly would be consistent with the Supreme Court's analysis in *Verizon*.

Read in light of *Verizon*, as it must be, the D.C. Circuit's opinion in *USTA* does not require a different result. There is a general consensus that loops, even DS1 loops, constitute a natural monopoly.[26/] Thus, duplication of the loop would entail costs that are, at a minimum, likely to be linked, at least to some degree, to natural monopoly. There is also no basis in the record to reach a different conclusion for DS1 level loops.

Because it cannot afford to duplicate the local loop, NewSouth's ability to provide service utilizing its own switches is intimately related to its ability to efficiently and cost-effectively combine its switch with the ILECs' local distribution plant, *i.e.*, the ILEC's ubiquitously deployed local loop and transport infrastructure. NewSouth is thus precisely the type of entrant identified by the Supreme Court as one who "may need to share some

---

25/ *See, e.g.*, Joint Comments of the Association for Local Telecommunications Services, Cbeyond Communications, LLC, DSLNet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, NewEdge Network, Inc., Pac-West Telecomm, Inc., PaeTec Communications, Inc, RCN Telecom Services, Inc. and US LEC Corp. at 48-49 ("ALTS Comments"); AT&T Comments at 13-15; Conversent Comments at 6-13; Joint Comments of El Paso Neetworks, LLC, CTC Communications, Corp., and Con Edison Communications, LLC at 5-10 ("Dark Fiber CLECs") ("The high cost of duplicating "last mile" facilities to a broad population of end users suggests that a wholesale market for competitive loop facilities will not develop in the near future."); Joint Comments of NuVox, Inc., KMC Telecom, Inc., E.SPIRE Communications, Inc., TDS Metrocom, Inc., Metromedia Fiber Network Services, Inc., and SniP LiNK, LLC at 58-60, 84-96 ("Fiber/Switch-Based CLEC Coalition"); OpenBand Comments at 3; Progress Telecom Comments at 12-14; Sprint Comments at 20-26; WorldCom Comments at 74-75; Z-Tel Comments at 52-56. *See also* ASCENT Comments at 40-43 ("Loops being the quintessential monopoly element, no entity has made any serious argument that they should not be made available on an unbundled basis"); CompTel Comments at 13-16; UNE-P Platform Committee Comments at 20-21.

26/ *See Rehearing Petition* at 12 (identifying the loop as "an element widely agreed to have natural monopoly characteristics").

facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches)."[27/] NewSouth also faces the "practical difficulty" acknowledged by the Supreme Court (but ignored by Justice Breyer) that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service."[28/] As *Verizon* noted, the unbundling rules are designed to accommodate the needs of this type of carrier by providing access to low-priced elements they cannot afford to duplicate so that they may be induced to "enter and build" those elements sensibly duplicable.[29/]

The evidence in the record is overwhelming that carriers cannot provide service to customers at less than the DS1 level through self-deployed switches, largely because of the costs of having to integrate the switch into the ILEC's local network render switch-based service at such lower volumes uneconomical. These costs include collocation and manual cutovers. In light of those costs, carriers are impaired without access to switching, at least for the provision of service to customers below the DS 1 level. Again, *USTA* does not require a different result. *USTA* did not address the costs of integrating the switch into the ILEC's network – costs which are linked to natural monopoly because they largely involve costs in accessing the local loop. Thus, when the costs of self-deploying a switch are properly understood to include the necessarily incurred costs of integrating the switch into the ILECs' network, impairment is readily demonstrated, even under *USTA*.

27/ *Verizon*, 122 S.Ct. at 1672 n.27.

28/ *Id.*

29/ *Id.*

Finally, it is wholly consistent with both *Verizon* and *USTA* for the Commission to take a number of steps described herein to make access to the local loop more efficient and thus less costly. Effectively, these steps will make switching even more sensible to duplicate by reducing the costs of integrating the switch with the elements of the ILEC network, particularly the local loops, which are too expensive to duplicate. These steps will promote further switch deployment, enable carriers to make more efficient use of their switches, and enable carriers to wean more customers off of UNEP and onto their own switching platform.

III. THE RECORD AMPLY DEMONSTRATES THAT REQUESTING CARRIERS ARE IMPAIRED WITHOUT UNBUNDLED ACCESS TO THE LOCAL LOOP AND LOCAL SWITCHING

The record supports the conclusion that carriers continue to be impaired without access to local loops and EELs, including DS1 loops, which have been the primary focus of NewSouth's comments. Similarly, the record confirms that carriers are impaired in their ability to provide services without access to unbundled switching and UNEP, especially for customers with insufficient demand to warrant using DS1 loops. As noted above, these conclusions are buttressed by the Supreme Court's ruling in *Verizon* and certainly not undermined by *USTA*.

A. CLECs Are Impaired Without Access to DS1 Loops.

1. There Are No Alternatives to ILEC DS1 Loops.

Commenters in this proceeding generally have discussed loop impairment with respect to two broad categories of loops – high capacity loops and voice grade loops.[30/]

30/ *See, e.g.*, Allegiance Comments at 19-26; ALTS Comments at 40-58; AT&T Comments at 125-34 (discussing the economics of the local loop); Fiber/Switch-Based CLEC Coalition Comments at 70-83 (noting that "the local loop is the *sine qua non* of

NewSouth believes that the record demonstrates impairment with respect to all capacity levels, but, in terms of analyzing impairment on a more granular analysis, NewSouth concurs with WorldCom's comments that loop categories may be more fully refined.[31/] There is a relevant difference between DS1 loops, which are used by NewSouth and numerous other competitors to provide service to smaller businesses, and DS3 and OC-n level loops which provide service, including broadband services, to much larger business customers. Even SBC concedes that there is a distinction between DS1 loops and higher capacity loops, proposing different unbundling obligations for DS1 loops than for DS3 and higher capacity loops – although the approaches suggested by SBC are, for the reasons explained below, untenable.[32/]

Although the Commission appears to include DS1 level loops within the category of high capacity loops,[33/] DS1 loops are, in terms of capacity, and their use, much closer to DS0 voice grade loops.[34/] A DS1 loop can be channelized into 24 voice grade loops, whereas a DS3 is equivalent to 672 voice grade channels and an OC-48 is equivalent to 32,256 voice grade circuits. NewSouth channelizes DS1 loops to provide its customers,

---

local competition and is by far the most difficult element to replicate to any meaningful degree" and that "high capacity loop facilities are the key to bringing broadband services to consumers"); Sprint Comments at 20-26.

31/ *See* WorldCom Comments at 74-78.

32/ SBC Comments at 100-01. For an explanation of the fallacy of SBC's approach, *see supra* notes 51-55 and accompanying text.

33/ *Notice* ¶ 52. NewSouth's initial comments also identified DS1 loops as high capacity loops without further differentiation. On the basis of the record developed thus far, NewSouth concurs with WorldCom that further differentiation for impairment analysis is appropriate.

34/ There is one key difference between DS1 loops and analog loops – provision of the former need not entail a "hot cut," whereas the latter does.

on average, 17 separate lines. Additionally, DS1 loops, at least those utilized by NewSouth, typically are copper facilities, whereas OC-n level facilities are fiber-based.

In its initial comments, NewSouth explained that it was impaired without access to DS1 unbundled loops because there are no alternatives outside the incumbent LECs' network and because it is not economically feasible to duplicate these facilities.[35/] The record supports both of these conclusions. The record demonstrates that there are simply no alternatives to ILEC local loop facilities,[36/] and that there has been virtually no self-deployment of copper loops, or loops of any kind below the OC-n level.[37/]

As the Commission has previously found, and as confirmed by the record in this proceeding, the cost of self-deploying local loops is substantial, regardless of capacity.[38/] Carriers have offered compelling evidence that the cost of self-deploying loops is prohibitively high.[39/] The notion that competing carriers realistically could incur such costs for any appreciable segment of its customer base, especially at a time when capital

---

35/ NewSouth Comments at 13-17.

36/ *See, e.g.*, Sprint Comments at 21-22; Worldcom Comments 74-75 (noting that "for the vast majority of buildings where there is likely to be demand for DS1 circuits, there are no alternatives to the incumbent LECs' facilities").

37/ *See, e.g.*, AT&T Comments at 132 ("Because it is not economically feasible to replicate copper facilities, AT&T self-provisions *no* copper loops to any of its customers for either local or long distance services.") (emphasis in original); Sprint Comments at 20-21; Worldcom Comments at 75 (noting that the cost of recent building adds for WorldCom has averaged about $250,000).

38/ *UNE Remand Order* ¶ 182.

39/ *See, e.g.*, ALTS Comments at 56-57 (citing *City Light Investor's Guide* estimates that fiber deployment costs $100,000 to $300,000 per mile for placing fiber underground, $50,000 per mile for placing fiber on poles, and $10,000 to $60,000 per mile for placing fiber in pipelines); Sprint Comments at 20-22. Building loop plant continues to be prohibitively expensive and time consuming as CLECs face obstacles such as obtaining rights-of-way and permitting, capital investment and other factors that impede the process of self-deploying loops. *See* Fiber/Switch-Based CLEC Coalition Comments at 74-75.

for the telecommunications sector has all but evaporated, is nonsensical. Moreover, because the cost of constructing the loop is sunk and would be stranded once the competing carrier loses the customer, replication of the local loop is a clear barrier to entry.[40/] Additionally, given that the level of traffic volume (and hence the level of revenue) that can be generated from a DS1 loop is much less than the level that can be generated by DS3 or OC-n level circuits, self-deployment of a DS1 loop to the customer is even more economically infeasible than higher capacity circuits.[41/]

Even carriers that have deployed some fiber in metropolitan areas remain wholly reliant on ILEC last mile facilities to reach customers. Indeed, the record shows that no CLEC has yet been able to replicate the ILECs' network of loop elements in any given market through self-provisioning, and no third-party vendors have replicated the ubiquity of the ILEC networks.[42/] Incumbent LEC loops thus continue to be the only available link to the vast majority of current and prospective customers.[43/]

The evidence submitted by these commenters is further documented by the CCG Report on the State of CLEC Competition.[44/] That report confirms that competitive

---

40/ *UNE Remand Order* ¶ 182.

41/ AT&T's economic analysis suggests that the "smallest fiber-loop facility that can be installed is an OC-3 loop, which is equivalent to nearly 2,000 voice grade lines." AT&T Comments at 134.

42/ *See, e.g.*, Fiber/Switch-Based CLEC Coalition Comments at 31.

43/ Fiber/Switch-Based CLEC Coalition Comments at 73.

44/ CCG Consulting Inc, State of CLEC Competition (July 17, 2002) ("*CCG Report*"). CCG Consulting conducted a survey of CLEC operations in six markets: Albany, New York; Augusta, Georgia; Boston, Massachusetts; Chicago, Illinois; Corpus Christi, Texas; and Portland, Oregon. The companies participating in the survey included Allegiance Telecom, AT&T, Birch Telecom, Broadview Networks, Choice One Communications, Conversant Communications, Covad, Electric Lightwave, Eschelon Telecom, Focal Communications, Ionex Communications, KMC Telecom, MCI Metro,

wireline carriers have not self-deployed loops below the OC-n level.[45/] Even at the OC-n level, CLECs have built out to only a fraction of the buildings in their respective markets.[46/] For example, in Augusta, Georgia, a market served by NewSouth, only 13 of the 7,728 commercial buildings in the MSA have been connected by a competing carrier's loop facilities.[47/] These facilities consist of one OC-12 loop and 12 OC-3 loops. Moreover, as with all other markets included in the survey, the CLEC that has deployed these facilities does not make them available to other carriers on a wholesale basis.[48/]

Intermodal broadband competition does not provide a basis for limiting the ILECs' loop unbundling obligations. First, intermodal competition is irrelevant to unbundling because the existence of intermodal competition for end user services (*i.e.* cable modems as an alternative to ILEC DSL service) is not the same thing as the availability of wholesale services that could serve as a substitute for unbundled access to ILEC network elements.[49/] Second, there is still essentially no intermodal competition in any local market for the small and medium businesses served by companies such as

---

McLeodUSA, New Edge Networks, NewSouth Communications, PaeTec Communications, TDS, WorldCom, and XO Communications.

45/ *CCG Report* at 6.

46/ *CCG Report* at 3, 6.

47/ *CCG Report* at 3, 6.

48/ *CCG Report* at 4,6.

49/ ALTS Comments at 39. The plain language of the 1996 Act provides that competitors must have access under Section 251, not just that a theoretical competitive alternative for end user services may exist. *See* 47 U.S.C. § 251(d)(2)(B) ("the failure to provide access to such network elements would *impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer*.") (emphasis added). *See also* ASCENT Comments at 26 ("A legitimate intermodal inquiry must be limited to the availability of alternative sources for the network components a competitor would otherwise secure from an incumbent LEC on an unbundled basis").

NewSouth.[50/] Finally, as explained above, negating unbundling obligations because one or more carriers has built a different network is inconsistent with the Supreme Court's decision in *Verizon*.

2. ILEC Proposals to Restrict Loop Unbundling Are Without Merit

Despite the overwhelming evidence of impairment in this record, some of the ILECs contend that at least some loops should not be made available on an unbundled basis.[51/] SBC, for example, contends that the all loops above the DS1 level should be taken off the UNE list, and that DS1 loops should not be available in those wire centers with two or more collocators, those wire centers that service 15,000 or more business lines, and those wire centers with $150,000 or more per month in special access revenues.[52/]

SBC's proposed DS1 standard bears no relation to impairment. It is simply illogical to assume that, because a carrier has collocated in an ILEC's central office, the carrier can also deploy DS1 loops to its customers.[53/] NewSouth, for example, is collocated in incumbent LEC offices, but it has no transport or loop facilities and, in fact, is wholly reliant on incumbent LEC loops and largely reliant on incumbent LEC

50/ *See* NewSouth Comments at 13; *see also* Allegiance Comments at 20-22; ALTS Comments at 39-40; WorldCom Comments at 44-48.

51/ Qwest, to the contrary, makes no contention that local loops should not be unbundled.

52/ SBC Comments at 100-101.

53/ *See* Fiber/Switch-Based CLEC Coalition Comments at 79-80.

transport.[54/] Thus, the presence of a NewSouth collocation provides no evidence of the ability of either NewSouth or any other carrier to self-deploy loops. Nor is it evidence of an alternative source of supply for local loops.

A collocating carrier deploying its own fiber to a central office is not evidence of a carrier's ability to economically duplicate loops at the DS1 level. One would at least need to know what capacity of local loop facilities (if any) that the collocater has deployed and to which locations. Moreover, the mere presence of other carrier collocations is not probative of the availability of alternative sources of local loop facilities unless those carriers lease wholesale capacity on their loops.

The amount of business lines or special access revenues also is not an indicator of impairment. The raw number of ILEC business lines served from a central office says nothing about the number of customers a CLEC can reasonably expect to serve with its own loops or whether it makes economic sense to build a DS1 loop to a customer.

Special access revenues also are no indicator of impairment. Indeed, relying on special access revenue would lead to a perverse result. Some of the special access revenue may well be derived from CLECs leasing last mile facilities from ILEC special access tariffs because the ILEC would not provide access to those facilities as UNEs. In other words, ILECs could bootstrap their refusal to provide UNEs into evidence that they need not provide UNEs. Finally, the evidence upon which SBC draws its conclusions is

---

54/ *See* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Affidavit of John Fury ¶ 21 (filed July 17, 2002) (attached hereto) ("Fury Affidavit").

quite dubious because it relies on a highly inaccurate "Fact Report" produced by the ILECs.[55/]

3. Loops Should Be Unbundled on a National Basis.

The *USTA* court castigated the Commission for adopting a uniform, national list of UNEs and failing to assess whether impairment might vary from market to market.[56/] Notwithstanding the inaccuracy of that charge,[57/] NewSouth recognizes the Commission's interest in exploring a more granular impairment analysis. With respect to loops, relevant market parameters would appear to be those that are geographic and capacity related. Customer and service considerations appear to be too broad or amorphous.[58/]

At this time, and based on this record, there is no need to undertake a market-by-market assessment for loop impairment as the record does not reflect any relevant differences across any relevant market for DS1 loops or EELs. The record shows that there has been no self-provisioning of DS1 level loops, and that there is no alternative

---

55/ *See infra* Section V.

56/ *USTA*, 290 F.3d at 422-26.

57/ As the Commission noted in its *Rehearing Petition*, the *UNE Remand Order* did tailor UNE requirements to take into account geographic and customer limitations where the record warranted it. *Rehearing Petition* at 5.

58/ Creating parameters for unbundling based on service considerations would be unlawful, bad policy, and administratively unworkable. *See* ASCENT Comments at 28-33; CompTel Comments at 49-82; NewSouth Comments at 50-57. *See also* Fiber/Switch-Based CLEC Coalition Comments at 53-58. ("Congress was clear … that the services for which elements are used should not be a basis for defining the incumbents' UNE obligations. Section 251 is purposefully agnostic as to the services that a new entrant intends to provide …. A service specific unbundling approach also would create uncertainty and stifle innovation."). A service-by-service approach also "would spur endless and resource-draining disputes between ILECs and CLECs over the use of UNEs." *Id.* at 57.

source of supply for DS1 loops outside the ILECs network in any identifiable market. The record thus does not support undertaking any market-by-market impairment analysis for DS1 loops. Similarly, the record has revealed no temporal or proxy-based trigger for removing DS1 loops from the unbundling obligation that has any rational connection to actual impairment. The Commission should thus reaffirm the DS1 loop unbundling obligation on a nationwide basis pending the next overall periodic review.

B. CLECS Are Impaired Without Access to Unbundled Switching or UNEP.

1. The Costs of Integrating the Switch Into the ILEC's Network Are Critical in Assessing Impairment Without Access to Unbundled Switching.

The Supreme Court affirmed that an unbundling policy that facilitates access to the incumbent LECs' network elements that are "expensive" and thus "unlikely to be duplicated" is consistent with the deregulatory and competitive purposes of the Act.[59/] The Supreme Court reached this conclusion by noting that access to "expensive" facilities, such as "loop elements" at TELRIC rates reduces barriers to entry, "particularly for smaller competitors," and puts such carriers in a position to "build their own versions of less expensive facilities that are sensibly duplicable."[60/] The Supreme Court also understood that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate

---

59/ *Verizon*, 122 S.Ct. at 1668 n.20.

60/ *Id. See also id.* at 1672 n.27 ("entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements, (say, digital switches or signal-multiplexing technology.").

elements jointly necessary to provide a desired telecommunications service."[61/] In this way, wrote the Court, "the Act allows for an entrant that may have to lease some 'unnecessarily expensive' elements in conjunction with building its own elements to provide a telecommunications service to consumers."[62/]

The Supreme Court was, in fact, describing the business strategy employed by NewSouth and a number of other smaller carriers that have commented in this proceeding. These carriers have deployed their own switches, where economical to do so, but they can provide a desired telecommunications service only if incumbents "simultaneously share" local loop elements which, as demonstrated above, are "expensive" to duplicate. In other words, as the Supreme Court recognized, carriers such as NewSouth must integrate their self-deployed network elements with the parts of the incumbents' network that cannot be sensibly duplicated.

The necessity of having to integrate an element, such as a switch, into the incumbent's network creates unavoidable obstacles and costs that must be taken into account when assessing impairment without access to unbundled switching. It is not just the cost of the element itself that determines impairment, although those costs are relevant, it is also the unavoidable costs and obstacles incurred as a result of having to integrate that element into the incumbent's network in order to access the "shared" elements that are too expensive to sensibly duplicate.[63/] These additional costs, implicitly

---

61/ *Id.*

62/ *Id.*

63/ *See* Z-Tel Comments at 34-38 (demonstrating that the added costs of integrating a self-provisioned switch – and particularly loop cutover costs, "vastly exceed the cost of the switch itself" and would lead to impairment of Z-Tel's ability to serve mass market customers).

acknowledged by the Supreme Court, are not addressed by the *USTA* Court, even though the Commission detailed such costs in its *UNE Remand Order.*[64/] Moreover, the existence of such obstacles and costs, which are even more fully developed in this record than during the *UNE Remand* proceeding, explain why the costs of self-deploying elements such as switches are not, as the *USTA* court seems to suggest,[65/] the same type of cost disparities faced by any new entrant in any sector of the economy.

Additionally, the costs of integrating a self-deployed switch into the incumbents' network are in fact costs that may well be viewed as "linked (in some degree) to natural monopoly."[66/] This is because the costs and obstacles of integrating a switch into the incumbent's network revolve largely, but not solely, around costs of accessing the local loop, which is "widely agreed to have natural monopoly characteristics."[67/] These additional costs have been described by NewSouth and other carriers and are summarized below.

Collocation. In order to access the local loop unbundled network element, incumbent LECs require carriers to purchase collocation space in their central offices. Collocation entails significant costs, as the Commission has previously found.[68/] Even with new collocation rules, collocation costs remain substantial. On average, for example, NewSouth estimates that it incurs costs totaling approximately $500,000 over

---

64/ *See, e.g., UNE Remand Order* ¶¶ 262-66 ("Our standard recognizes that the full costs of using self-provisioned circuit switching must include the costs incurred by a competitor to substitute its local circuit switch for that of the incumbent" – citing collocation costs and loop cutover process).

65/ *USTA*, 290 F.3d at 426.

66/ *Rehearing Petition* at 12.

67/ *Id.* at 12.

68/ *UNE Remand Order* ¶¶ 263-64.

the first three years at each collocation site.[69/] These costs include building the collocation space, recurring charges for rent and power, plus the costs of purchasing and installing the equipment in the collocation space.[70/]

Manual Loop Cutover. To access analog local loops, the loop must be disconnected from an incumbent LEC's switch and transferred to a CLECs switch at the collocation site. Currently, this is unavoidable due to the fact that the loop has been hard wired into the incumbent LECs' switch. Manual cutovers have a real monetary impact because incumbent LECs assess a non-recurring charge for each cutover.[71/] But the most important "cost" in terms of impairment is that manual cutovers are an inherent gating mechanism to competition since only so many cutovers can physically be accomplished within a given time. This is simply a matter of manpower and the logistics of the process.[72/] The inherently manual nature of the cutover process leads to provisioning delays, prolonged outages and other service problems that customers will not and should not have to tolerate.[73/]

Z-Tel provided a vivid illustration of the extent to which the manual cutover process creates significant entry barriers for mass-market customers. It noted that in New

---

69/ *See* Fury Affidavit ¶ 4.

70/ *Id.*

71/ *See, e.g.*, Z-Tel Comments at 35-36.

72/ AT&T Comments at 214-17. The hot cut process is also "inherently unreliable," requiring manual work to disconnect the voice-grade loop from the ILEC switch and to connect it to the competing carrier's collocation for transport to its switch, and synchronized software changes to associate the customer's telephone number to the CLEC switch. *Id.* at 214.

73/ AT&T Comments at 214-15. Even when the ILECs are able to meet the Section 271 performance criteria, ten percent of customers experience delays because of cutovers and five percent suffer significant outages.

York, Verizon on average provided 12,500 loop cutovers to all CLECs combined per month.[74/] Generously assuming that Z-Tel would utilize 25 percent of Verizon's total hot cut capacity for all carriers, Verizon could do no more than manually cutover loops in numbers sufficient to handle the churn of Z-Tel's existing customer base.[75/] In other words, because of the manual cutover process, competing carriers can do no more than stand still in the market. For this reason alone, carriers are impaired without access to switching (and UNEP) at least for loops subject to the manual hot cut process.

Incumbent LECs argue that loop cutovers do not result in impairment because the incumbents have reduced the incidence of errors and outages in the cutover process.[76/] Such arguments are, however, irrelevant to the gating problem created by the need to undertake the manual cutover in the first place. The issue is not how well the process works (that is not to say that outages and other glitches in the process do not also create problems), the issue is that there is an inherent limitation on the number of manual cutovers that can be performed, and that this limitation acts as a powerful governor on the speed of local entry for customers served by analog loops that require a manual cutover process.

The need for manual hot cuts is a critical component of the impairment analysis for switches used to provide service in conjunction with unbundled analog loops. Hot

---

74/ Z-Tel Comments at 40.

75/ Z-Tel Comments at 40-41. *See also* AT&T Comments at 216 ("if local churn ever approached the levels of long distance churn, there would have to be tens of millions of hot cuts performed each year. No incumbent LEC has come even close to successfully provisioning coordinated loop cutovers in the volume necessary for competing carriers to serve the mass market.").

76/ Qwest Comments at 25-28; SBC Comments at 76; Verizon Comments at 101-02.

cuts are not as significant an issue for DS1 loops, which is one reason that CLECs can provide service at the DS1 level with their own switch.[77/]

Transport Costs. The incumbent LECs' local distribution network consists of a hierarchical switching topology that has been deployed over many years and paid for by captive ratepayers. New entrants, even the largest among them, cannot conceivably hope to replicate the same switching topology. Instead of deploying large numbers of switches, each of which serves a relatively small geographic area, as the incumbent LECs have done, new entrants deploy fewer switches that cover much larger geographic areas and utilize transport facilities to reach customers.[78/] Competing carriers that have substituted their switches for the incumbent's switch must incur the cost of transporting traffic from the collocation site (where the customer's loop is accessed) back to the competing carriers' switch, and then transporting the call to its destination, which often includes transport back to the same central office from which the call originates. Assessing impairment for the switching element must thus take into account the costs of transport.[79/]

77/ Fury Affidavit ¶ 6.

78/ As explained in NewSouth's initial comments, NewSouth is exploring the deployment of micro switches in incumbent LEC central offices as a way to decrease transport costs and potentially serve smaller customers. NewSouth Comments at 23-25.

79/ Commenters have provided compelling evidence of impairment without access to ILEC interoffice transport facilities. *See, e.g.*, AT&T Comments at 125-40 (discussing the economic considerations that make it impracticable for CLECs to self-provision transport). The Commission has previously recognized the high costs of self-deploying transport. The direct equipment costs of purchasing interoffice transport equipment exceeds $300 per line, and the cost of constructing alternative transport facilities is between $200,000 and $300,000 per mile in densely populated areas. *UNE Remand Order* ¶ 356.

Switching Costs. The costs of integrating a self-deployed switch into the incumbent LECs' network are in addition to the costs of the switch itself. Because the cost of a switch is a fixed cost, economies of scale and scope are important.[80/] New entrants will have much higher per unit costs for switching than will incumbent LECs because of the simple fact that incumbents have an embedded, substantial customer base over which the spread the fixed cost of the switch, (*i.e.*, the switch will be fully or nearly fully utilized). New entrants have no such luxury. Although the *USTA* Court found this cost disparity to be an insufficient basis upon which to find impairment, (as noted above, the *USTA* Court inexplicably did not address the costs of having to integrate the switch into the incumbents's network), the new entrant's lack of scale and scope economies is relevant, even if not determinative. With fewer customers over which to spread the fixed cost of the switch, carriers must target customers with higher revenue streams.[81/]

2. The Costs of Self-Deploying Switches Impairs NewSouth's Ability to Provide Service at Less than the DS1 Loop Level.

The costs identified above dictate the method and scope of NewSouth market entry. In its initial comments, NewSouth explained that it could not economically provide service via its own switches (combined with unbundled loops) unless customers had sufficient telecommunications needs to warrant purchasing a DS1 facility channelized to provide at least 12 voice lines or at least 10 lines overall, four of which

---

80/ *UNE Remand Order* ¶ 263-66.

81/ *See, e.g.*, AT&T Comments at 233-34.

were data lines each at a speed of 384 kbps.[82/] Below that level, NewSouth cannot provide service economically to customers except through the use UNEP.[83/]

NewSouth's experience is consistent with other carriers. Z-Tel notes, for example, that the economics of switch self-deployment change only when it becomes viable to aggregate loops at a customer location and provide service at a DS1 interface or higher. Z-Tel agrees with other carriers that this aggregation typically becomes economically viable at 16-20 lines.[84/] Although this range is slightly higher than NewSouth's 12 voice line break-even point, the range is in line with NewSouth's average DS1 customer line count of 17 lines. To the extent the Commission determines to retain a switch carve out, establishing the carve out at the DS1 level, rather than the current 3-line rule, comports with current economic, business, and operational realities.

Any suggestion that switches need not be unbundled at all within an MSA or other larger geographic area where one or more other carriers have deployed switches is overly simplistic. The analysis above demonstrates that the capacity level of the loops being used in conjunction with those switches must also be taken into account. Thus, for purposes of undertaking a more granular analysis, it is not sufficient to simply assess where switches have been deployed, but how those switches have been utilized. In this regard, capacity level is a much better indicator than customer segment or the services being provided over the facility. Customers of the same size, for example, may have sharply differing telecommunications needs.

82/ *See, e.g.*, NewSouth Comments at 14-17.

83/ Fury Affidavit ¶ 5.

84/ Z-Tel Comments at 52-54 & n.113.

IV. THE COMMISSION CAN PROMOTE FURTHER FACILITIES INVESTMENT IN SENSIBLY DUPLICABLE ELEMENTS SUCH AS SWITCHES BY IMPROVING THE EFFICIENCY OF ACCESS TO NETWORK ELEMENTS THAT CANNOT BE DUPLICATED

NewSouth's initial comments demonstrated that access to unbundled network elements actually promotes and enables facilities-based competition.[85/] The competitive provision of services to end users through the use of a carrier's self-provisioned switch can be further enhanced by increasing the efficiency of access to the ILECs' network into which the self-deployed switch must be integrated. In this context, access refers both to the methods of connecting to the ILEC network as well as maximizing the efficient use of those ILEC network elements, primarily loop and transport, which must be shared.

The previous sections explained that there are costs and obstacles associated with simultaneous use of a self-provisioned CLEC switch and ILEC network elements. These costs and obstacles are critical to the impairment analysis for switching because they bound the extent to which a carrier economically can provide services through the use of a self-deployed switch. As noted in the preceding section, the costs and obstacles associated with integrating a self-provisioned switch into the incumbent LECs' network presently limit the economic provision of switch-based service to those customers with sufficient telecommunications needs to warrant obtaining DS1 service through the aggregation of a minimum number of lines.

The Commission can reduce or mitigate these costs and obstacles – and thereby increase the opportunity for providing services via self-provisioned switches – through the adoption of the sound and legally sustainable policies described below. For example, the cost of having to collocate in an ILEC central office in order to access local loops is a

85/ NewSouth Comments at 7-13.

major impediment to switch deployment and utilization. However, as explained below, there is no sound policy rationale for requiring collocation to access unbundled loops. Similarly, the manual cutover process is a major impediment to serving residential and low-volume small businesses via self-provisioned switches. Adopting an electronic loop cutover process avoids these costs. As these costs are avoided or reduced, the economic provision of service via a competitive switch can be expanded to serve a greater number of customers – furthering the goal of facilities-based competition. Reducing loop access costs also enables carriers to more fully utilize their available switch capacity, thus spreading the fixed cost of the switch over a greater customer base. As per unit costs decrease, carriers can reduce consumer prices. Moreover, as these costs and obstacles are reduced, and the opportunity for providing switch-based services expanded, the need for ILEC switching and UNEP should diminish as well. Reducing these costs thus provides an exit mechanism for ILEC switch unbundling obligations, as discussed below.

As summarized below, NewSouth and other carriers have identified a number of steps that can be taken to improve the efficiency of integrating self-provisioned switches with ILEC local loops and transport. These steps are fully consistent with the recent decision of the Supreme Court in *Verizon* and the D.C. Circuit's decision in *USTA*. As previously noted, the Supreme Court recognized that the statute's unbundling obligations are designed to assist carriers in deploying elements that are "sensibly duplicable" by ensuring low cost access to those elements that are expensive to duplicate.[86/] The

---

86/ *Verizon*, 122 S.Ct. at 1668 n.20 ("a policy promoting lower lease prices for expensive facilities unlikely to be duplicated . . . puts competitors that can afford these wholesale prices (but not the higher prices the incumbents would like to charge) in a position to build their own versions of less expensive facilities that are sensibly duplicable").

Supreme Court further acknowledged in *Verizon* that the provision of services to an end user may well entail the simultaneous use of "share[d]" and "unshared" network elements.[87/] The *USTA* Court certainly agreed with this principle.[88/]

The steps that NewSouth and other competitors advocate are consistent with these decisions. They improve access to facilities that are too expensive to sensibly duplicate (*e.g.*, the loop) in a way that puts competitors in a position to expand the use of their own network elements (*e.g.*, the switch). Moreover, because these policies largely involve improving access to and use of the local loop – generally agreed to be a natural monopoly[89/] – these policy recommendations would be consistent even with *USTA*. These steps include eliminating the requirement to collocate in order to access local loops, making EELs realistically available, eliminating co-mingling restrictions, affirming that ILECs must provide attached electronics when providing DS1 loops, clarifying that ILECs are otherwise required to make modifications to their networks to insure access to UNEs, and adopting AT&T's electronic loop provisioning proposal.

A. Identification of Specific Steps to Improve the Efficiency of Integrating Switches Into the ILEC Network

1. There is No Sound Policy or Legal Basis for Requiring Carriers to Collocate in ILEC Central Offices in Order to Access Local Loops.

As explained in its initial comments, NewSouth is able to obtain a DS1 local loop network element as a UNE when the network element terminates at a NewSouth

---

87/ *Id.* at 1672 n.27.

88/ *USTA*, 290 F.3d at 426.

89/ *Rehearing Petition* at 12.

collocation arrangement in an incumbent LEC central office.[90/] NewSouth is *unable* to obtain a DS1 local loop network element as a UNE, however, when exactly the same type of facility terminates in a NewSouth point of presence in an incumbent LEC central office, but not in a NewSouth collocation arrangement. In the latter case, NewSouth can only obtain the local loop facilities from the ILEC's special access tariff.

There is no basis either in law or policy for treating exactly the same type of facility, used for exactly the same purpose, as a UNE in one instance but not in the other. Nor is NewSouth aware of any technical infirmity that would prevent the ILECs from providing access to local loops without collocation. Indeed, the process NewSouth proposes for loop access without collocation is currently utilized by ILECs when providing local loop facilities from special access tariffs.[91/] Additionally, the competing carrier must be free to combine the local loop provisioned in this manner with interoffice transport, regardless of whether that transport is obtained from the ILEC as a UNE, as a special access service (*i.e.*, no "co-mingling restriction) or from a third party transport provider. This modest change in the Commission's rules will further encourage facilities

---

90/ NewSouth Comments 42-45.

91/ As explained in its initial comments, when NewSouth purchases a DS1 loop facility from an ILEC special access tariff, the ILEC terminates the DS1 loop at the ILEC's distribution frame where it is cross connected to ILEC multiplexing equipment. The facility is then connected to a channel facility assignment (CFA) block – which acts as NewSouth's point of presence in the ILEC central office -- where it is connected to the ILEC's (for intraLATA) or a third party's (for interLATA) interoffice transport for backhaul to NewSouth's switch. NewSouth Comments at 43. NewSouth proposes that this same process be utilized to access the local loop facility as an unbundled network element. To make this proposal practical, the ILEC multiplexing equipment should be classified as part of the unbundled loop element (*i.e.*, as attached electronics). Alternatively, if the multiplexing must be purchased from an ILEC tariff, "co-mingling" of the tariffed multiplexing service with the unbundled loop should be allowed. NewSouth Comments at 40-41.

investment by switch-based carriers by reducing the costs of accessing the local loop and thus the costs of serving customers and by increasing switch utilization. This change should apply to stand-alone loops and to EELs.

2. EEL Restrictions Should be Eliminated and EELs Defined As a Single UNE.

Reaffirming the availability of the enhanced extended loop and, equally importantly, eliminating the restrictions on the use of EELs, will further encourage facilities investment. NewSouth and other carriers have explained that the EEL usage restrictions serve no useful policy purpose and have been distorted by ILECs to preclude or hamper carriers from effectively utilizing EELs.[92/] In but the latest example of ILEC harassment, BellSouth has launched an unlawful and unauthorized campaign to audit numerous CLECs purportedly to ensure compliance with EEL usage restrictions.[93/] The most effective way to end ILEC efforts to sabotage use of EELs is to eliminate the restrictions that make the gamesmanship possible in the first place.

Moreover, in light of the Supreme Court's affirmation of the Commission's rules on UNE combinations,[94/] the Commission should also now take the step that it felt

---

92/ *See, e.g.*, NewSouth Comments at 37-39; ALTS Comments at 103; AT&T Comments at 204; Fiber/Switch-Based CLEC Coalition Comments at 49-52; WorldCom Comments at 80.

93/ *See, e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Joint Comments of Cbeyond Communications, LLC, ITC^DeltaCom, KMC Telecom Holdings, Inc., NewSouth Communications Corp., and XO Communications, at 2-5 (filed July 3, 2002) (describing BellSouth's unlawful attempts to limit access to UNEs through a coordinated campaign of routine audits aimed at chilling competition). These comments were filed in response to a Petition for Declaratory Ruling filed by NuVox, Inc. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Petition for Declaratory Ruling of NuVox, Inc. (filed May 17, 2002).

94/ *Verizon*, 122 S.Ct. at 1682-87.

constrained from taking in the *UNE Remand Order* and define the EEL as a single UNE. In the *UNE Remand Order*, the Commission declined to define the EEL as a separate network element in light of the pending review of the Commission's rule requiring ILECs to combine network elements, and it felt constrained to order EELs only when the loop and transport elements were already combined. [95/] The Supreme Court has now lifted that constraint. The loop element, practically speaking, should, therefore, be defined as a transmission facility between a distribution frame or its equivalent in an ILEC central office where the competing carrier is either collocated or has a point of presence (*see* Section III. A. 1. *supra*) and the loop demarcation point at an end user customer premises, including inside wire owned by the ILEC, regardless of whether that facility transverses one or more intermediate ILEC central offices between those two points (or whether intermediate electronics or remote terminals are included). In simple terms, a loop should be defined as *any* transmission facility, including attached electronics, from the "line side" of the competing carriers' point of presence or collocation in an ILEC central office to the customer premises.

Commenters have provided compelling grounds for finding that requesting carriers are impaired without access to EELs. [96/] EELs improve the efficiency of CLEC-deployed switches by expanding the number of customers that can be served via the switch without incurring additional collocation costs. As NewSouth noted in its initial

---

95/ *UNE Remand Order* ¶¶ 478-482.

96/ *See, e.g.*, ALTS Comments at 99-106; Fiber/Switch-Based CLEC Coalition Comments at 98-101; WorldCom Comments at 79-80.

comments, EELs have the potential to expand by a factor of ten the number of central offices from which NewSouth can serve customers via its own switching equipment.[97/]

3. Carriers Must Be Allowed to Convert Special Access Stand Alone Loops to UNEs.

As NewSouth explained in its initial comments, incumbent LECs contend that, because the Commission has established a framework for converting loop/transport combinations purchased as special access service to EELs, they have no duty to convert to UNEs stand-alone loops purchased from special access tariffs. For the reasons set forth in NewSouth's comments, there is no basis for incumbent LECs to refuse to convert stand-alone loops to UNEs.[98/]

4. "Co-mingling" Restrictions, Especially in Areas Where Transport or Other Elements May Not Be Available as a UNE, Should be Removed.

The pernicious effects of the current co-mingling restrictions have been well documented in the record and should be eliminated.[99/] The ILECs have used this restriction to impose inefficiencies on competitors, and thereby artificially raise their cost of doing business. It is particularly important that co-mingling restrictions be lifted if the Commission determines to eliminate certain facilities as UNEs – for example SONET transport. Because most CLECs will still need ILEC transport (given the absence of third party alternatives), they will need to buy transport from ILEC retail tariffs. If a CLEC cannot combine unbundled loops with tariffed transport, the co-mingling restrictions, as interpreted by the ILECs, could effectively eliminate unbundled loops. NewSouth thus

---

97/ NewSouth Comments at 22 (noting that, with EELs, NewSouth can expand its reach to 800 central offices from the 80 in which it is currently collocated).

98/ NewSouth Comments at 37-39.

99/ *See, e.g.*, NewSouth Comments at 39-41; Sprint Comments at 55-57.

urges the Commission to remove such restrictions, which are a deterrent to competition and have no foundation in law or policy.

The elimination of co-mingling restrictions is also necessary to ensure the utility of other of the proposals set forth in this section. For example, the right to access loops in central offices without requiring collacation would be meaningless if carriers cannot connect those loops to tariffed transport or tariffed multiplexing, to the extent the latter elements are not defined as UNEs.

5. ILECs Must be Required to Attach Electronics to UNEs to the Same Extent They Do for Their Own Customers or for Special Access Services.

As explained in NewSouth's initial comments and in the comments of other carriers, the Commission has ample authority to require incumbent LECs to attach the electronics necessary to derive high-capacity loops and tranport.[100/] Incumbent LECs have taken an increasingly restrictive view of their obligation to modify their networks in order to provide nondiscriminatory access to network elements, even though this obligation has been affirmed by the courts.[101/] The incumbents' refusal to attach electronics necessary to derive a DS1 signal is but one example of the incumbents' increasing use of lack of facilities or facilities unavailability arguments to thwart access to UNEs – although ILECs readily make the same facilities available if sought as a retail

---

100/ *See, e.g.*, NewSouth Comments at 30-37; Fiber/Switch-Based CLEC Coalition Comments at 77; Sprint Comments at 32-34 ("The Commission should either expressly add multiplexing to the list of UNEs, or clarify that it is a feature that must be made available to requesting carriers with either loop or transport [and] … [t]he Commission also should exercise its authority to direct ILECs to provid multiplexing as a feature available to CLECs upon request even where it is not currently available.").

101/ *Iowa Utilities Board v. AT&T Corp.*, 120 F.3d 753, 812-13 (8th Cir. 1997), *appealed on other grounds*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

special access offering. NewSouth respectfully requests that the Commission adopt the rule proposed in NewSouth's initial comments with respect to the ILEC's obligation to attach electronics.[102/] Requiring competing carriers to attach the electronics needed to derive a DS1 level interface only serves to needlessly increase new entrants' costs and reduce their ability to provide services using their own switching facilities.[103/]

6. The Commission Must Act to Eliminate the ILEC Sabotage and Gamesmanship that Increases Transaction Costs or Thwarts Access Altogether.

As indicated above, the ILECs' refusal to attach electronics necessary to derive DS1 or other digital signals is but one example of their increasing refusal to provide UNEs on "no facilities" grounds. The gamesmanship must end. The Supreme Court has specifically affirmed that it is reasonable for the Commission to develop unbundling rules meant to remove practical barriers to entry and to counter the ILECs incentive for gamesmanship or "sabotage."[104/] Another prime example of this gamesmanship is the so-called "no facilities" position taken by Verizon and other ILECs. Through this argument, the ILECs have suggested that their facilities are unavailable because making such facilities available to competitive carriers would require the ILEC to augment, modify, or rearrange its electronics or network in a manner inconsistent with the Eighth Circuit's holding that CLECs may not force an ILEC to construct a superior quality network on

---

102/ NewSouth Comments at 37 (proposing that (1) ILECs must attach electronics when spare slots are available; (2) ILECs must add capacity when existing slots are exhausted whenever and to the same extent such capacity would be added to fulfill retail orders or special access orders; (3) ILECs must inform competing carriers when central office equipment is exhausted, where such capacity is available, and any plans to extend such capacity).

103/ NewSouth Comments at 20.

104/ *Verizon*, 122 S.Ct. at 1685; *Iowa Utilities*, 525 U.S. at 394.

their behalf.[105/] This interpretation ignores the specific holding of the Eighth Circuit that "endorse[s] the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to [ILEC] facilities to the extent necessary to accommodate interconnection or access to network elements.'"[106/] Further, the ILECs have not established a lawful basis for their "no facilities" policy.[107/]

This proceeding provides an opportunity to end this gameplaying by further clarifying the ILECs' obligation to modify their network to enable non-discriminatory UNE access. NewSouth urges the Commission to consider adopting a clarification that defines existing facilities with reference to the incumbent LEC's facilities available in the existing service area where the request is made, not just the facilities available for the specific origination and termination points for the UNE being requested.[108/] Such a clarification is consistent with state and judicial interpretations, as described in NewSouth's initial comments.[109/]

7. The Commission Should Adopt Electronic Loop Provisioning.

Ultimately, changing local service for a customer should be as seamless as the process for making a change to its presubscribed interexchange carrier. As AT&T noted in its comments, "in the long distance market, all interexchange carriers have access to an electronic and automated system that allows customers to switch providers easily, at low

---

105/ *Iowa Utilities Board*, 120 F.3d at 812-13.

106/ *Id.* at 813 n.33.

107/ ALTS Comments at 113-115.

108/ NewSouth Comments at 32.

109/ *Id.* at 32-35.

cost, and with no service disruption."[110/] Because this process is automated, there should be no inherent limits to the number of customers that can change providers.[111/] NewSouth thus supports AT&T's proposal for electronic loop provisioning ("ELP").

Electronic loop provision has numerous advantages. The process of changing carriers would become fast, accurate, and reliable.[112/] No hot cuts, physical rewiring or other physical changes would be necessary, eliminating much of the coordination procedures between carriers, manual work by technicians, and the need for work in collocation space in ILEC offices.[113/] NewSouth therefore concurs with AT&T's assessment that the automated process for switching interexchange carriers was "an essential prerequisite" to establishing today's "robustly competitive long distance market and implementing ELP is an essential prerequisite to establishing a competitive local market."[114/]

B. States Should Make a Factual Determination as to Whether ILECs Have Implemented Measures to Improve Loop Access Efficiency Sufficient to Warrant De-Listing of Unbundled Switching In Discrete Markets, Subject to FCC Guidelines and FCC Concurrence.

NewSouth believes that State Commissions should continue to play an important role in developing and implementing unbundling obligations. In Section IV. A. *supra*, NewSouth identified a number of policy modifications that will greatly improve the efficiency of access to and utilization of local loops. These steps have the potential to significantly reduce the additional costs and barriers to providing service via CLEC-

---

110/ AT&T Comments at 236.

111/ *Id.*

112/ *Id.* at 237-38

113/ *Id.* at 238 & n.227.

114/ *Id.* at 236.

deployed switches coupled with ILEC loops and transport. As these barriers and costs are reduced, CLEC reliance on unbundled switching can be alleviated. Implementation of these policies thus provides a mechanism by which the ILECs can reduce or eliminate their switch unbundling obligations. NewSouth believes that the states can play an important role in making these determinations and facilitating implementation of these policies.

Commenters have also suggested that states may have an important role to play in determining the scope of UNE obligations.[115/] NewSouth generally concurs that State Commissions should play an important role in determining the scope of unbundling obligations – both with respect to adding UNEs and removing UNEs.[116/] One aspect of the states' assessment of whether to "de-list" switching in some discrete markets should be whether the ILEC has fully implemented the policies advocated in Section IV. A. *supra*. The successful implementation of these policies will enhance the ability of CLECs economically to provide service via their own switching platform to an increasingly larger class of customers. Thus, as these policies are implemented, the obligation to provide unbundled switching may be reduced accordingly. The question of

---

115/ *See, e.g.*, ALTS Comments at 129-32; AT&T Comments at 241-51 (noting that State Commissions "are generally in a better position than the Commission to assess local competitive conditions specific to a state" and that a State Commission "is also in a better position to develop the factual evidence that would be necessary to any inquiry into whether (and to what extent) a particular element should be de-listed in that state"); Fiber/Switch-Based CLEC Coalition Comments at 53-69; Z-Tel Comments at 86-92.

116/ This result is also mandated by the Act. Section 251(d)(3) expressly provides that "the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission … that establishes access and interconnection obligations of local exchange carriers," as long as though obligations are consistent with Section 251. 47 U.S.C. § 251(d)(3). State Commissions also have the "authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list." *UNE Remand Order*, ¶ 154; 47 C.F.R. § 51.317(b)(4).

whether these steps have, in fact, been implemented may be more practically assessed in the first instance by State Commissions who are more familiar with local conditions.[117/] NewSouth proposes a process whereby states, as part of their overall UNE-related responsibilities, undertake a fact-finding procedure to determine whether unbundled switching obligations may be reduced or eliminated in light of the ILECs' implementation of the measures designed to improve access and utilization of ILEC network elements. NewSouth suggests that states undertake this assessment pursuant to the guidelines and standards developed by this Commission.

The state review would consist of a recommendation to "de-list" or not. The recommendation would be submitted to this Commission for final action.[118/] In order to prevent ILECs from flooding CLECs with state proceedings, NewSouth proposes that an ILEC first make a *prima facie* showing to a state that it has implemented the steps identified in Section IV. A. *supra*. As part of this showing, a State Commission would assess whether an ILEC's OSS is capable of meeting the increased demand for local loops that will invariably result with the implementation of these policies. It should be noted that a demonstration by an RBOC that it had met OSS requirements for purposes of Section 271 may be insufficient. The showing of nondiscriminatory OSS access made in the context of Section 271 reviews may not necessarily have demonstrated the ability of these systems to meet the heightened demand for loops that invariably will result from the implementation of electronic loop provisioning and the other steps identified above. The showing required in the Section 271 proceedings is based on the ability of ILEC OSS

117/ *See, e.g,* AT&T Comments at 241, 246-48; ALTS Comments at 131.

118/ *See, e.g.*, AT&T Comments at 248-51; Fiber/Switch-Based CLEC Coalition Comments at 67-69.

to meet reasonably foreseeable demand based on the use of manual hot cuts. Once manual hot cuts are no longer required, demand may exceed that which was considered under the Section 271 review. If a State Commission determines that an ILEC has made a *prima facie* showing, the CLECs would need to have an opportunity to proffer evidence that the steps have not been fully implemented and that they remain impaired with respect to switching.

V. THE ILEC'S UNE "FACT REPORT" ERRONEOUSLY IDENTIFIES NEWSOUTH AS AN ALTERNATIVE SOURCE OF FIBER, CALLING INTO QUESTION THE REPORT'S OVERALL VERACITY

A lynchpin of the incumbent LECs' argument that unbundling is no longer necessary is the so-called UNE Fact Report which purports to demonstrate how competitive various components of the local market have become over the previous three years.[119/] According to the ILECS, the evidence in the "Fact Report" justifies a substantial reduction in unbundling obligations.[120/] If the evidence in the "Fact Report" with respect to NewSouth is any indicator, the veracity of the report is highly questionable.

119/ The "data" submitted by the ILECs includes appendices dedicated to totals of CLEC lines, CLEC circuit switches, wire centers in the top 100 MSAs where CLECs have acquired customers through ported numbers, rate exchange areas in the top 100 MSAs where CLECs have obtained NXX codes, CLEC packet switches, wireless switches, competition collocation providers in the top 50 MSAs, hot-cut performance, CLECs performing ATM and Frame Relay, additional information on softswitches, CLEC by MSAs, and an estimate of the CLEC special access market share.

120/ The "Fact Report" states that, since the *UNE Remand Order* "there has been a further sharp increase in the availability of competitive alternatives to ILEC interoffice transport facilities." UNE "Fact Report" at III-6. The ILECs, in Exhibit K to the Fact Report, then purport to identify those CLECs in the top 150 MSAs with "operational" and "on-net networks" which "*appear* to involve the use of their CLEC's own transport facilities." UNE "Fact Report" at K-1 (emphasis added).

The "Fact Report" erroneously identifies NewSouth as a source of alternative fiber available either for transport or for local loop purposes in a number of areas.[121/] In fact, NewSouth has no fiber at all. It leases all of its fiber from the incumbent LEC or other third parties.[122/] Nonetheless, the "Fact Report" identifies NewSouth as a carrier with its own interoffice transport or loop facilities in 14 MSAs.[123/] Although NewSouth is not in a position to evaluate the overall accuracy of the Fact Report, given the blatantly erroneous information with respect to NewSouth, the Commission must carefully evaluate how much weight it will give to this "Fact Report" and the evidentiary support it provides to commenters who have relied so extensively upon it.[124/] Moreover, the "Fact Report" appears to continue the same errors identified in the previous iteration of this report submitted by the ILECs.[125/]

VI. IF THE FCC DOES ELIMINATE CERTAIN UNES, IT SHOULD AVOID DISRUPTIONS BY GRANDFATHERING EXISTING UNE-BASED SERVICE ARRANGEMENTS

NewSouth believes that the record supports retention of most, if not all, current UNEs. To the extent that the Commission decides, however, to eliminate any UNE after concluding that a given UNE does not meet the necessary and impaired standard,

---

121/ UNE "Fact Report" at Appendix K.

122/ *See* Fury Affidavit ¶ 21.

123/ UNE "Fact Report" at Appendix K.

124/ *See, e.g.*, Bell South Comments at 2, 11, 22-25, 31, 37-39, 42-44, 46-47, 49, 51, 55-56, 59, 62-64, 66-69, 79-81, 83-86, 88-89, 91-94, 96, 98; Qwest Comments at 5-6, 13, 21-25, 27-31, 33-34, 37-39, 43, 47-49; SBC Comments at 2-7, 19-20, 22-24, 38-39, 55, 58-59, 67-75, 77, 85-88, 91-93, 98-104; Verizon Comments at 8-21, 23, 27, 30, 34, 37-38, 44, 50, 52-54, 59, 88-89, 91, 95-98, 101, 103-04, 106-08, 110, 112-16, 118-19, 121, 123-28.

125/ Fiber/Switch-Based CLEC Coalition Comments at 86-87 & n.280 (The Fact Report appears to be "based on numerous faulty assumptions and methodological flaws that render it unreliable."); *see also* AT&T Comments at 125.

NewSouth requests that the Commission ensure that existing UNE-based service arrangements are unaffected by the decision. NewSouth recommends adoption of a requirement that prohibits an ILEC from disconnecting any UNE already in use or from unilaterally raising rates for such an element above TELRIC.[126/] Such a grandfathering provision is imperative to protect consumers from undesired changes in their preferred telecommunications provider and it provides for an adequate transition period.[127/]

In the absence of such grandfathering arrangements, the ILECs may feel empowered to disconnect UNEs already in use. This dire prediction is not conjectural, but is based upon the past conduct of the ILECs. For example, as soon as the D.C. Circuit held that CLEC-to-CLEC cross connects were not required under Section 251,[128/]

126/ In addition, the Commission should act to prevent backsliding by reaffirming that the removal of a UNE under Section 251 does not remove any of the express obligations of Section 271. *UNE Remand Order*, 15 FCC Rcd at 3905, ¶ 471 ("Although Section 271 does not specify that the checklist network elements must be provided in accordance with Section 251(c)(3), the Commission nonetheless has independent authority to ensure that items (iv)-(vi) of the checklist are provided on a reasonable, nondiscriminatory basis."). *See also id.* at 3905, ¶ 470 (stating that if an element no longer meets the unbundling standards of Section 251, then "the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a)"). These obligations, which expressly require the provision of unbundled loops, transport, switching, 911 services, operator service/directory assistance, and white pages directories, are separate, independent and binding on all RBOCs with Section 271 applications or authority. 47 U.S.C.§ 271(c)(2)(B)(iii-vi); *UNE Remand Order*, 15 FCC Rcd at 3904, ¶ 469; *see also* ALTS Comments at 117-18.

127/ *See* ASCENT Comments at 48 (noting that the required lead time will be "substantial" in terms of the acquisition, installation and provisioning of multiple switches to serve an existing customer base); CompTel Comments at 107-09 ("Any UNE phase-out period must be sufficient to allow competitive carriers the practical ability to reconfigure their operations without degrading or disrupting service to their customers."); Fiber/Switch-Based CLEC Coalition Comments at 113-15.

128/ *GTE Service Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000).

ILECs began ripping them out in many of their central offices.[129/] Failure to restrain such action will have a detrimental effect on customers who will not be able to obtain services from the carrier of their own choosing. Failure to adopt a grandfathering provision also will likely lead to litigation because of the uncertainty surrounding whether ILECs are required to fulfill the terms and conditions of their agreements with CLECs.[130/] Such litigation will only serve to create uncertainty and to decrease the confidence of industry, capital markets and the courts in the Commission's authority.[131/] For these reasons, NewSouth supports the recommendation of the Fiber/Switch-Based CLEC Coalition to adopt a reasonable grandfathering provision.[132/]

More specifically, NewSouth recommends a grandfathering provision that prohibits an ILEC from unilaterally disconnecting or re-pricing a UNE used to provide service to a customer as of the effective date of the order "de-listing" such a UNE. This prohibition should last for a period of five years unless the customer relationship is severed earlier.

VII. CONCLUSION

The Commission should use this proceeding to help ensure that the 1996 Act's promise of local competition becomes a reality. It can do so in a manner consistent with the D.C. Circuit's holding in *USTA* while fulfilling the mandate of the Supreme Court in *Verizon* and the Congress in the 1996 Act to "eliminate the monopoly enjoyed by the inheritors of AT&T local franchises" by reaffirming that carriers are impaired without

---

129/ Fiber/Switch-Based CLEC Coalition Comments at 114 & n.387.

130/ *Id.* at 113-14.

131/ *Id.* at 113-14.

132/ *Id.* at 113-15.

unbundled access to the local loop (including EELs) and local switching for low volume customers, as well as taking specific steps to improve the efficiency of access to those network elements that cannot be sensibly duplicated.

Respectfully Submitted,

NEWSOUTH COMMUNICATIONS

/s/ Jake E. Jennings

Jake E. Jennings
Vice President – Regulatory Affairs
NewSouth Communications
NewSouth Center
Two N. Main Center
Greenville, SC 29601
864/672-5877

Michael H. Pryor
Christopher R. Bjornson
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Counsel to NewSouth Communications

July 17, 2002

WDC 316643v2

CERTIFICATE OF SERVICE

I, Christopher R. Bjornson, hereby certify that on the 17th day of July 2002, I caused copies of the foregoing Reply Comments of New South Communications to be served on the following by first-class, postage-prepaid mail or via electronic mail (*) to:

Marlene M. Dortch*
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Qualex International*
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Dorothy Atwood
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Tom Navin
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Matthew Brill
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Dan Gonzalez
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Jeffrey Carlisle
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

/s/Christopher R. Bjornson
Christopher R. Bjornson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

AFFIDAVIT OF JOHN FURY

State of South Carolina)
) SS.
County of Greenville)

I, **JOHN FURY**, being duly sworn upon oath, do hereby depose and state as follows:

1. My name is John Fury. I am employed by NewSouth Communications Corp. as Carrier Relations Manager. My business address is Two North Main Street, Greenville, SC 29601. I have personal knowledge of the matters set forth in this Affidavit.

2. The largest portion of NewSouth's customer base is comprised of small and medium sized businesses. These businesses have aggregated loops on their premises with a PBX or Key system.

3. Where it is economical to do so, NewSouth Communications provides these customers access to digital services though its Lucent 5ESS switch using UNE Loops, Enhanced Extended Links, or T1s leased from the ILEC's Special Access Tariffs. In

order to access UNE Loops or EELs, BellSouth and Verizon require NewSouth to establish collocations in their central offices. To date, NewSouth has established 80 collocation arrangements.

4. The requirement to collocate imposes substantial costs on NewSouth. On average, for example, NewSouth estimates that it incurs costs totaling approximately $500,000 over the first three years at each collocation site. These costs include building the collocation space, recurring charges for rent and power, plus the costs of purchasing and installing the equipment in the collocation space.

5. In large part because of the costs to collocate equipment at incumbent LEC central offices and other costs associated with having to integrate NewSouth's switches with incumbent LEC loops and transport, NewSouth cannot economically serve customers with NewSouth switches unless those customers have sufficient demand to warrant the use of a DS1 level loop. Currently, NewSouth cannot economically serve customers that lease fewer than 12 voice lines or 10 voice and four data lines. On average, NewSouth's DS1 customers utilize 17 lines. In order to provide service to lower volume customers, NewSouth must utilize a UNEP arrangement.

6. One reason that NewSouth is able to provide service to customers utilizing its own switch and unbundled DS1 loops is that DS1 loops do not require a hot cut. The majority of customers NewSouth provisions go though a conversion process that migrates them from their existing analog line-based services to a new digital loop. Many of these multi-line customers expand existing services and can add broadband dedicated access to Internet in increments of 64 kilobits per second.

7. Where customers have existing vendor relationships for customer premises equipment such as PBX's, NewSouth works closely with those vendors to obtain necessary information about existing service configurations and to discuss the configuration of that equipment with NewSouth Communications' services.

8. The conversion process begins with a NewSouth technician performing an extensive site survey to verify the existence of environmentals necessary to provide service i.e. survey of alarm, fax, modem, voice lines, equipment make and model, AC power access, UPS backup power, surge protection, wall space, backboard and/or rack space, jack location, router location, start signaling, DTI card.

9. NewSouth then verifies and tests the customer's E911 records and functionality.

10. NewSouth next assigns an Installation Specialist who is responsible for coordinating installation date, time and other details with both the customer and the customer's CPE vendor.

11. NewSouth's Switch Site Managers review circuit assignment documents and assign orders to switch technicians for turn up and testing of the new loop.

12. Site survey, demarc location, circuit design information and configuration information are reviewed once again by the technician just prior to turn-up.

13. NewSouth dispatches a technician to the customer's premises on the day of the cutover to NewSouth services and along with NewSouth Operations and Provisioning personnel are available to the customer and/or the customer's vendor for the duration of service turn-up.

14. Disruption to service is minimized due in great part to the fact that most customers are still up on the incumbent's service while the new loop is installed and service conversion is taking place. In other words, a hot cut is not required.

15. Occasionally, disruption of service may be experienced due to lags in updates to the NPAC portability databases used by the industry to properly route calls to ported numbers.

16. These service interruptions are generally very short in duration (10 to 30 seconds) and NewSouth makes every effort to make sure that customer's telephone numbers are ported as efficiently and rapidly as possible.

17. Further, only the customer's ability to receive inbound calls is disrupted during this period and access to lifeline and other outbound calling capabilities is not disrupted.

18. Where customers convert from existing digital services (typically customers from other CLECs), as with conversion from ILEC facilities, NewSouth orders a new digital loop that is installed and turned-up in parallel with existing service. Again, no hot cut is required.

19. Facilities from former providers are disconnected after porting activity is completed and acknowledged by both parties.

20. After conversion NewSouth assumes responsibility for the maintenance and repair of customer facilities, which is done through our 24/7/365 Network Operations Center in Greenville, SC.

21. I have been informed that the incumbent LECs have submitted a report that identifies NewSouth as a carrier that has deployed its own fiber facilities in 14 MSAs. In fact, NewSouth has not deployed any of its own fiber in any market. NewSouth is wholly

reliant on incumbent LEC local loop facilities to reach NewSouth customers. I am unaware of any non-ILEC that provides access to local loop facilities on a wholesale basis. NewSouth is also largely reliant on ILEC intraLATA transport to backhaul traffic to NewSouth's switches.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on July 17, 2002.

/s/ John Fury

John Fury